Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SOLOW BUILDING COMPANY, LLC,

Petitioner,

v.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a state court considering a motion to vacate an arbitration award in a matter "affecting commerce" decline to apply the "manifest disregard of the law" standard applied by federal courts under the Federal Arbitration Act?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption of the case contains the names of all the parties. Petitioner Solow Building Company, LLC does not have a parent corporation and there is no publicly held company owning ten percent or more of petitioner's stock.

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The opinion and order of the Appellate Division, Supreme Court of New York, First Judicial Department, entered on April 29, 2004, is reported at 6 A.D.3d 356, 2004 Slip Op. 03225 (N.Y.A.D. 1st Dep't 2004). It may be found at A. 1a-3a.

The order of the New York Court of Appeals denying leave to appeal is reported at 3 N.Y.3d 605, __ N.E.2d __ (N.Y. Sept. 2, 2004). It may be found at A. 14a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The order of the Appellate Division, Supreme Court of New York, First Judicial Department, was entered on April 29, 2004. A timely filed motion for leave to appeal to the New York Court of Appeals was denied on September 2, 2004.

STATUTE INVOLVED IN THE CASE

The statute involved in the case is the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (hereinafter, "FAA"). The texts of §§ 1, 2 and 10 of the FAA are set out at A. 15a-17a.

STATEMENT OF THE CASE

Petitioner developed and owns and operates a major commercial office building known as 9 West 57th Street (the "Building") in the borough of Manhattan in New York City, serving national and international tenants (such as respondent) and affecting commerce in numerous respects. Respondent was a major tenant at the Building pursuant to a 25-year lease. Pursuant to an arbitration agreement in the lease, petitioner and respondent arbitrated a dispute over rental escalation and petitioner moved to vacate the resulting award (the "Award"). (Record on Appeal ("R.") 88-384.)

The motion to vacate was based on the doctrine, adopted by the federal courts in applying the FAA, of "manifest disregard of the law." (R. 61-62.) Petitioner contended that the arbitrators manifestly disregarded the law in the form of a prior judicial injunction (the "Injunction"), issued to these parties and governing these rental escalations. Petitioner urged both the court of first instance and the appellate courts to follow the federal doctrine of manifest disregard of the law.[1]

The court of first instance alluded to the doctrine of manifest disregard of the law but held, erroneously, that petitioner had failed to establish it. (A. 7a-8a.) On appeal of that ruling, the Appellate Division, Supreme Court of New York, First Judicial Department, declined to consider or apply the federal doctrine of manifest disregard of the law. To the

1. As to the court of first instance, *see* R. 61-62, 74, 88-89 and 99; as to the appellate courts, *see* Brief of Appellant to Appellate Division, First Judicial Department, dated January 29, 2004, at 1, 11-15, and Memorandum in Support of Petitioner-Appellant's Motion for Permission to Appeal, dated June 2, 2004, at 10-11.

contrary, the Appellate Division stated that "the panel's conclusions of law, *including the effect, if any, of the injunction or other prior judicial proceedings* on the calculation of the escalation, are *not judicially reviewable* for error . . ." (A. 2a, emphasis added.) Similarly, the facts as to whether the Award contravened the Injunction were deemed "also beyond judicial review." (A. 3a.)

The New York Court of Appeals denied petitioner's motion for leave to appeal to that Court. (A. 14a.)

Subsequent to the New York Court of Appeals' denial of petitioner's motion, the Appellate Division, First Judicial Department, in *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339 (N.Y.A.D. 1st Dep't 2004), on remand from this Court,[2] deemed the FAA applicable to an arbitration involving a commercial office building dispute in New York City and vacated the award in that case under the federal "manifest disregard of the law" doctrine. Petitioner has moved in the court of first instance to renew its motion to vacate the Award, based on a change in the law. N.Y. Civ. Prac. Law & Rules § 2221(e)[2].

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2. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *lv. denied*, 99 N.Y.2d 511, *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003). On petition for certiorari in *Wien & Malkin*, the Court vacated the prior decision of the Appellate Division, First Judicial Department, and remanded the case to that court for further consideration in light of *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003).

REASONS FOR GRANTING THE PETITION

The Decisions by the New York State Courts Are in Conflict with this Court's Decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin v. Helmsley-Spear, Inc.*

Certiorari should be granted because the decision of the state appellate court in this case decided an important federal question in a way that conflicts with the relevant decisions of this Court. Rule 10(c) of the Court. The relevant decisions are *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003), and *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *lv. denied*, 99 N.Y.2d 511, *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003). The Appellate Division, First Judicial Department's recent vacatur of the award in *Wien & Malkin*, on remand from this Court, after previously confirming the award under State law, underscores this conflict. *Wien & Malkin*, 783 N.Y.S.2d 339. The difference between applying federal law and applying State law to an award can be crucial.

The Courts of Appeals of every federal circuit universally recognize the "manifest disregard of the law" doctrine as a ground for vacating an arbitration award under the FAA. *See Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330-31 (1st Cir. 2000) (a reviewing court may vacate an arbitral award if it was made in "manifest disregard" of the law); *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (same); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) (same); *Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233-34 (4th Cir. 1998) (same); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381-82 (5th Cir.

2004) (same); *Nationwide Mutual Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003) (same); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir.) (same), *cert. denied*, 528 U.S. 811 (1999); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 799 (8th Cir. 2004) (same); *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1132-33 (9th Cir. 2003) (same); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (same); *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002) (same); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001) (same).

In this case, however, the Appellate Division, First Judicial Department decided an important federal question – whether to apply the "manifest disregard of the law" doctrine – by ignoring that doctrine altogether in favor of the application of state law. Citing state law, the Appellate Division stated that "the panel's conclusions of law, *including the effect, if any, of the injunction or other prior judicial proceedings* on the calculation of the escalation, are *not judicially reviewable* for error. . . ." (A. 2a, emphasis added.) Similarly, the facts as to whether the Award contravened the Injunction were deemed "also beyond judicial review." (A. 3a.) These rulings were directly contrary to the applicable federal rule as to manifest disregard of the law.

This case reaches the Court in essentially the same posture and with the same issues as did *Wien & Malkin* last year. This case, like *Wien & Malkin*, meets the "affects commerce" test requiring application of the FAA. The Court should reach the same result as in *Wien & Malkin*: vacate the order of the Appellate Division, First Department, and remand the case for further proceedings consistent with *Citizens Bank v. Alafabco, Inc.*

While the Appellate Division's refusal to apply federal law was *sub silentio*, that is not a barrier to a grant of certiorari. *Test v. United States*, 420 U.S. 28, 95 S. Ct. 749, 42 L. Ed. 2d 786 (1975) (granting certiorari where court of appeals "affirmed . . . without discussing these issues" as to which certiorari was granted).

Further, this case presents an even more compelling one for application of the "manifest disregard of the law" doctrine than did *Wien & Malkin*. Here, the Injunction was a prior judicial order issued to these parties and governing the rental escalation issues contested in the arbitration.

If the "manifest disregard of the law" doctrine has any meaning, it should be this: Where a matter is governed by a prior judicial order, a court cannot confirm a subsequent arbitration award concerning that matter without reviewing the award to determine if it exceeds the arbitrators' power by granting relief contrary to the prior judicial order. The decision below held that there shall be no judicial review of a claim that arbitrators exceeded their power by rendering an award that was contrary to a prior judicial order controlling the matter. We respectfully submit that the FAA is applicable and does not permit a result so unsettling to the rule of law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the Appellate Division, Supreme Court of New York, First Judicial Department.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK ENTERED APRIL 29, 2004

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK

In re Application of
Solow Building Company, LLC,

Petitioner-Appellant,

For an Order, etc.,

-against-

Morgan Guaranty Trust Company of New York,

Respondent-Respondent.

Order and judgment (one paper), Supreme Court, New York County (Diane A. Lebedeff, J.), entered April 22, 2003, granting respondent tenant's motion to confirm an arbitration award in its favor and against petitioner landlord, and awarding tenant $519,864 in rent overpayments, plus interest, costs and disbursements, unanimously affirmed, with costs.

The dispute involves the calculation of additional rent under an escalation clause that was the subject of a prior arbitration between the parties. That arbitration determined the method of calculation and culminated in a confirmation order that enjoined landlord from using a different method in future years unless "necessitated by changes in the collective bargaining agreement" on which the escalation

clause was based and by which landlord was bound (*Morgan Guar. Trust Co. v. Solow*, 114 A.D.2d 818, *affd*, 68 N.Y.2d 779). Thereafter, tenant demanded arbitration of claimed overcharges in rent escalation, and, after an extensive arbitration hearing, was awarded a measure of the relief it sought. It does not avail landlord to argue that the award manifestly disregards the injunction, as well as this Court's decision in *Sage Realty Corp. v. Omnicom Group*, 278 A.D.2d 57, and therefore must be vacated. Although an arbitration panel may not overtly disregard the law, arbitrators are not strictly tethered to substantive and procedural laws and may do justice as they see it, provided that they do not violate a strong public policy, do not exceed a specifically enumerated limitation on their power and their decisions are not totally irrational (*Matter of Silverman [Benmor Coats]*, 61 N.Y.2d 299, 308; *Matter of United Fedn. of Teachers, Local 2 AFT, AFL-CIO v. Board of Educ.*, 1 N.Y.3d 72, 83). In addition, because arbitrators are not required to give reasons for their decision, an award cannot be attacked on the basis of a dissenting arbitrator's affidavit or other evidence that the panel refused to consider or failed to appreciate particular evidence or arguments (*Matter of Guetta [Raxon Fabrics Corp.]*, 123 A.D.2d 40, 41, 44-45; *Purpura v. Bear Stearns Cos.*, 238 A.D.2d 216, *lv. denied*, 90 N.Y.2d 806). Thus, the panel's conclusions of law, including the effect, if any, of the injunction or other prior judicial proceedings on the calculation of the escalation, are not judicially reviewable for error, especially where, as here, all the legal arguments were fully presented to the panel for its consideration. We note that the award, which on its face simply directs landlord to pay tenant a sum of money, in no way suggests that landlord's incorrect calculation of the escalation was

contemptuous of the injunction, or even inconsistent with the method of calculation determined in the prior arbitration. For all that appears, a method of calculation different from that used by landlord was, in the words of the injunction, "necessitated by changes in the collective bargaining agreement." If that be the basis of the award, findings of fact were made that are also beyond judicial review (*see Matter of Silverman, supra*; *Matter of United Fedn. Of Teachers, supra*).

ENTERED: APRIL 29, 2004

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX B — DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY DATED FEBRUARY 26, 2003

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: LA.S. PART 8

Index No. 114972/01
Mot. Seq. No. 002

Application of

SOLOW BUILDING COMPANY, LLC.,

Petitioner,

For an Order Pursuant to Article 75 of the CPLR Permanently Staying a Demand for Arbitration,

-against-

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

DIANE A. LEBEDEFF, J.:

Respondent Morgan Guaranty Trust Company of New York ("Morgan") moves pursuant to CPLR § 7510 for an order confirming an arbitration award, dated October 29, 2002, issued in its favor in the amount of $519,864.00, together with interest from July 1, 1998. Petitioner Solow

Building Company, LLC ("Solow"), cross-moves pursuant to CPLR § 7511(b) for an order vacating the award.[1]

Solow is the owner of 9 West 57th Street, a commercial office building in which Morgan leased a large block of space under a 25-year lease, for the period commencing February 1, 1974, and ending on January 31, 1999 (the "Lease"). Under the Lease, in addition to a fixed rent, Morgan was required to pay additional rent under an escalation clause based upon the increase in wages granted to certain workers pursuant to the collective bargaining agreements by which Solow is bound.

In 1996, the collective bargaining agreement referenced in the Lease was changed in a way that has led commercial tenants to assert that a lower wage rate must be used in calculating the amounts due under the porters' wage rate provision.[2] After Solow gave Morgan a notice of change dated

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1. A previous panel awarded Morgan $721,580, but the award was subsequently vacated due to the appearance of arbitrator partiality (*In the Matter of Morgan Guaranty Trust Co. of N.Y. v. Solow Building Co.*, LLC, 279 A.D.2d 431 [1st Dept.], lv. denied, 96 N.Y.2d 711 [2001]). Solow's petition for an order permanently staying Morgan's renewed demand for arbitration was denied (*In re Solow Building Company, LLC v. Morgan Guaranty Trust Company of New York*, 294 A.D.2d 224 [1st Dept.], lv. denied 98 N.Y.2d 611 [2002]).

2. Even earlier disputes concerning the method for calculating the additional rent were submitted to arbitration. An award was confirmed and the court also granted an injunction precluding Solow from computing the "escalated rents on any basis other than that determined by the arbitrator," unless the "formula may be modified

(Cont'd)

Appendix B

February 19, 1998, Morgan served a demand for arbitration, identifying five categories of claimed overcharges totaling almost $1.3 million, some of which depended on the wage rate change.

Following an extensive hearing, the arbitrators rendered an award in Morgan's favor for less than half the amount claimed. Solow seeks to vacate that award on the grounds that it was rendered in manifest disregard of the law established in *Morgan I*, and of a First Department decision ruling in favor of the landlord's position concerning the impact of the 1996 change in the collective bargaining agreement (*Sage Realty Corp. v. Omnicom Group, Inc.*, 278 A.D.2d 57 [1st Dept. 2000]). Solow also argues that the arbitrators disregarded an unreported Supreme Court decision, which involved the same issues (*The Jewish Community Centers Associate v. HAT Real Estate II, L.P.*, Index No. 605767/99 [Sup. Ct., N.Y. Co. Oct. 4, 2002]).

(Cont'd)

by agreement of the parties or necessitated by changes in the collective bargaining agreement by which Solow is bound" (*Morgan Guaranty Trust Co. of New York v. Solow*, 114 A.D.2d 818, 822-23 [1st Dept. 1985], affd, 68 N.Y.2d 779 [1986], "*Morgan I*"). This injunctive relief was found to be warranted by Solow's conduct, following arbitration, of continuing to issue wage escalation bills utilizing a method other than the one found by the arbitrators to be the correct one (*id.*, at 822; see also *Avon Products, Inc. v. Solow*, 215 A.D.2d 247 [1st Dept. 1995]). Absent an injunction compelling Solow to obey the confirmed ruling of the arbitrators in subsequent years, Morgan would have been forced either to pay inflated bills and then bear the expense and delay of annual arbitrations, or to withhold payment and risk eviction proceedings (*id.*).

Appendix B

It is the well-established policy of New York that, where the "parties have agreed to submit their dispute to binding arbitration, an award that is not clearly in violation of public policy should be given effect" (*Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 157 [1995]). An "award will not be vacated even though the court concludes that [the arbitrators'] interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 [1984]). "[A]bsent provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties"' (*id.*, citations omitted).

Here, the record shows that the parties presented extensive arguments before the arbitration panel concerning the impact and meaning of the *Morgan I* injunction, and the decision in *Sage Realty Corp. v. Omnicom Group, Inc., supra*. Morgan argued that the instant case was distinguishable because of differing language in the leases, and particularly, the Lease clause establishing a presumption that all workers have two years seniority (Article 7.01); Solow took the position that no change was required. Morgan also forwarded a copy of the decision in *The Jewish Community Centers Associate v. HAT Real Estate II, supra*, to the arbitrators while they were deliberating and argued in a cover letter that the decision should not be followed.

Thus, it is not shown that the arbitrators overtly disregarded any legal authority, or that the proposition for which Solow advocates is as well-defined and clearly established as it suggests. The arbitrators' decision to award Morgan some portion of its claim is not shown to be either irrational or in manifest disregard of law.[3] In light of the above, it is unnecessary to consider Morgan's further argument that Solow waived any argument based on the Morgan I injunction by failing to move to stay arbitration on that basis.

As for petitioner's submission of an affidavit of its party-arbitrator, a distinguished former Associate Judge of the New York Court of Appeals, the court observes that the practice of submitting an affidavit of an arbitrator after

3. Manifest disregard of the law "implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it" (*Sawtelle v. Waddell & Reed, Inc.*, __ A.D.2d __, 2003 WL 288471 [1st Dept. 2003]; see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 [2d Cir. 1986]; see *In re Arbitration Between UBS Warburg LLC.*, 294 A.D.2d 245 [1st Dept. 2002], manifest disregard found where arbitrators "overtly disregarded the law, and did not merely misinterpret it"). Parties seeking to vacate arbitral awards must also establish that the law allegedly ignored "was well defined, explicit, and clearly applicable to the case" (*In re Engel [Refco, Inc.]*, 193 Misc.2d 91, 106 [Sup. Ct., N.Y. Co. 2002], applying standard under the Federal Arbitration Act). When an issue of contract interpretation is submitted to arbitration "an award will not be vacated even if the arbitrator may have misconstrued or disregarded the plain meaning of the contract" (*Peckerman v. D & D Associates*, 165 A.D.2d 289 [1st Dept. 1991], citing *Albany County Sheriffs Local 775 of Council 82, AFSCME, AFL-CIO on Behalf of Hughes v. Albany County*, 63 N.Y.2d 654, 656 [1984]).

issuance of an award has long been disapproved by the courts (*Cavallaro v. Allstate Ins. Co.*, 124 A.D.2d 625 [2d Dept. 1986]; *Matter of Martin Weiner Co.*, 2 A.D.2d 341 [1st Dept. 1956], aff d., 3 N.Y.2d 806 [1957]; see also *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 [2d Cir. 1978], recognizing exception to the general rule in cases involving clear evidence of arbitrator impropriety). The reasons for judicial reluctance to consider such affidavits stem from the quasi judicial role of the arbitrator and the goal of finality in arbitration:

> "'As a quasi judicial officer, an arbitrator should not be called upon to give reasons for his decision.' *Lief v. Brodsky*, 126 N.Y.S.2d 657, 658 (ICY. Sup. Ct. 1953). 'Inquisition of arbitrators for the purpose of determining the processes by which they arrived at an award, finds no sanction in law.' *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F.Supp. 1276, 1286 (S.D.N.Y. 1979), quoting, *Martin Weiner Co. v. Fred Freund Co.*, 2 A.D.2d 341, 342 (N.Y. App.Div. 1956), affd, 3 N.Y.2d 806 (N.Y. 1957). For like reasons an arbitrator may not testify as to the meaning or construction of his written award. See *New York City Omnibus Corp. v. Quill*, 189 Misc. 892, affd, 272 A.D. 1015, 74 N.Y.S.2d 925, affd, 297 N.Y. 832 (N.Y. 1948). Any other view would make arbitration not the end, but only one step in the progress of litigation. See generally Domke, The Law and Practice of Commercial Arbitration, Chpt. 33 (1968)." (*Sperry Intern.*

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Trade, Inc. v. Government of Israel, 602 F.Supp. 1440 [S.D.N.Y. 1985]).

In this case, the affidavit adds nothing to the fully-reasoned dissent prepared by Judge Titone, which sets forth the basis for his view that the majority was acting in manifest disregard of the law.

Accordingly, consistent with the foregoing, the motion to confirm the award is granted and the cross-motion is denied.

This decision constitutes the order of the court.

Dated: February 26, 2003

s/ [illegible]
J.S.C.

APPENDIX C — ORDER AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY DATED MARCH 24, 2003 AND FILED APRIL 22, 2003

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index No. 114972/01

At Part 8 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse at 60 Centre Street, New York, New York, on the 24th day of March, 2003

PRESENT:

Honorable Diane A. Lebedeff,

Justice.

Application of

SOLOW BUILDING COMPANY, LLC,

Petitioner,

For an Order Pursuant to Article 75 of the CPLR Permanently Staying a Demand for Arbitration

-against-

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

Appendix C

ORDER AND JUDGMENT

The Respondent, Morgan Guaranty Trust Company of New York, by its attorneys, Kaye Scholer LLP, having made a motion for an order confirming the award of an arbitration panel of the American Arbitration Association dated October 29, 2002, directing that judgment be entered in Respondent's favor in the amount of $519,864.00 plus interest thereon at the legal rate of nine percent (%) per annum commencing from July I, 1998 (the "Award"), and the Petitioner Solow Building Company, LLC, by its attorneys Miller & Wrubel P.C., having filed a cross-motion for an order vacating the Award, and the motions having come on to be heard in the Motion Support Courtroom of this Court, held at the Courthouse thereof located at 60 Centre Street, New York, New York, on the 7th day of February, 2003, and the Court having considered the arguments and proofs submitted in support of the motion and cross-motion, and an order granting Respondent's motion to confirm the Award, and denying Petitioner's cross-motion to vacate the Award, having been filed with the Clerk of the Court on March 4, 2003;

NOW, on motion of Kaye Scholer LLP, attorneys for Respondent Morgan Guaranty Trust Company of New York, it is hereby

ORDERED that the motion to confirm the award is granted and the award is confirmed and it is further

ADJUDGED, that Respondent Morgan Guaranty Trust Company of New York, One Chase Manhattan Plaza, New York, New York 10081 have judgment against Petitioner

Appendix C

Solow Building Company, LLC, 9 West 57th Street, New York, New York 10019, in the amount of $519,864.00, plus interest thereon at the legal rate of nine percent (9%) per annum commencing from July 1, 1998 in the amount of $225,093.99 and costs and disbursements of $200.00 to be determined by the Clerk of the Court, for a total sum of 745,157.99 and that Respondent shall have execution therefor.

ENTER:

s/ [illegible]
J.S.C.

s/ [illegible]

APPENDIX D — DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR LEAVE TO APPEAL DATED SEPTEMBER 2, 2004

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of September 2004

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 584

In the Matter of Solow Building Company, LLC,

Appellant,

v.

Morgan Guaranty Trust Company of New York,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX E — RELEVANT STATUTES

9 U.S.C. §§ 1, 2, & 10

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to

submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[**(5)** Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(2)

No. 04-758

IN THE

Supreme Court of the United States

SOLOW BUILDING COMPANY, LLC,

Petitioner,

v.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the New York State court which reviewed an arbitration award under the "manifest disregard of the law" standard observe the standard of review required by the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Morgan Guaranty Trust Company of New York ("Morgan") merged in 2001 into a corporation now known as JPMorgan Chase Bank, N.A. and Morgan no longer exists.

JPMorgan Chase & Co. is the only publicly held company that owns 10% or more of the stock of JPMorgan Chase Bank, N.A.

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Wien & Malkin LLP v. Helmsley-Spear, Inc.
300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002),
lv. denied, 99 N.Y.2d 511, *cert. granted*,
540 U.S. 801, 124 S. Ct. 222 (2003) 2, 3, 6

Wien & Malkin LLP v. Helmsley-Spear, Inc.
783 N.Y.S.2d 339 (N.Y.A.D. 1st Dep't 2004) . . . 3, 4, 5

STATEMENT OF THE CASE

Petitioner, having lost an arbitration, now seeks to overturn the award, claiming that there was a "manifest disregard of the law." However, the New York courts below explicitly found that there had been no "manifest disregard of the law" and therefore there is no basis for granting certiorari.

This case concerns an arbitration over a rent escalation clause in a twenty-five year lease between petitioner and respondent. Respondent, Morgan Guaranty Trust Company of New York, a New York corporation, leased Manhattan office space from petitioner, also a New York entity. After the parties argued and briefed all relevant law and facts, the arbitrators awarded respondent $519,864 of its total claim for $1,289,565.

Petitioner asked the New York Supreme Court to vacate the award, claiming that the award was in "manifest disregard of the law." On February 26, 2003, the New York Supreme Court confirmed the arbitration award in its entirety. In its decision, that court analyzed the "manifest disregard" standard and held that the arbitrators' decision was "not shown to be either irrational or in manifest disregard of the law." (A. 8a).

Petitioner appealed to the New York Appellate Division, First Department, renewing its argument about a purported manifest disregard of the law. At oral argument, the five-judge panel questioned counsel for both petitioner and respondent about whether the arbitration award was in manifest disregard of the law. In its unanimous decision on April 29, 2004, the Appellate Division found petitioner's argument about manifest disregard of the law unavailing. (A. 2a).

For a third time, petitioner questioned whether the arbitration award was in manifest disregard of the law in a motion seeking leave to appeal to the New York Court of Appeals. The Court of Appeals denied leave to appeal on September 2, 2004. (A. 14a).

During the pendency of the appeals in this matter, this Court decided *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003), and remanded *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *lv. denied*, 99 N.Y.2d 511, *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003), for proceedings consistent with the *Citizens Bank* opinion. Nevertheless, in its subsequent appeals to the New York Appellate Division and the New York Court of Appeals, petitioner never argued that this matter should be governed by the Federal Arbitration Act or by this Court's decisions in *Citizens Bank* or *Wien & Malkin*, and petitioner did not move to renew its motion to vacate based on a change in law until November 23, 2004.

REASONS FOR DENYING THE PETITION

New York State Court Decisions Are Consistent with this Court's Decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin v. Helmsley-Spear, Inc.*

Certiorari should be denied because there is no conflict between the decisions of the New York courts and this Court. New York courts have been applying the Federal Arbitration Act's "manifest disregard of the law" standard of review of arbitration awards in arbitrations both within and outside the context of the Federal Arbitration Act, in accord with this Court's decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin LLP v. Helmsley-Spear, Inc.* Moreover, in the case at hand, the

New York courts explicitly reviewed the arbitration award under both the "manifest disregard" standard as well as the New York "totally irrational" standard – even though petitioner never raised the issue of whether the Federal Arbitration Act governed this arbitration.

This Court held in *Citizens Bank v. Alafabco, Inc.* that the Federal Arbitration Act governs arbitrations where the transaction at issue "affect[s] commerce" whether or not there is a "substantial effect" on interstate commerce. 539 U.S. 52, 56, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46, 51 (2003). Subsequently, this Court remanded *Wien & Malkin LLP v. Helmsley-Spear, Inc.* to the New York Appellate Division, First Department for proceedings consistent with *Citizens Bank* – specifically, to determine: (a) whether the transaction at issue "affected commerce" thereby mandating application of the Federal Arbitration Act; and (b) if it did affect commerce, whether the arbitration award met the "manifest disregard of the law" standard of review under the Federal Arbitration Act. 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *lv. denied*, 99 N.Y.2d 511, *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003).

Petitioner's reliance on *Wien & Malkin* is misplaced because the arbitration award in this matter has already been reviewed under the "manifest disregard of the law" standard by all levels of the New York courts. In *Wien & Malkin*, the arbitration award had not been previously reviewed pursuant to the Federal Arbitration Act standard and on remand the sole issue addressed by the New York Appellate Division was whether the arbitration award manifestly disregarded the law. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339, 340-41 (N.Y.A.D. 1st Dep't 2004).

In contrast to *Wien & Malkin*, the issue of whether the award in this case was in manifest disregard of the law was briefed by both parties before all levels of the New York courts. Although petitioner never previously argued that the Federal Arbitration Act governed this arbitration – and, unlike *Wien & Malkin*, respondent rejects petitioner's contention that the Federal Arbitration Act applies to this matter – petitioner did argue that the award should be reviewed under the "manifest disregard of the law" standard, which had been applied in prior New York cases. The New York decisions then relied upon by petitioner had applied the "manifest disregard" standard to arbitrations both within and outside the Federal Arbitration Act context. *See, e.g., Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 113 (N.Y.A.D. 1st Dep't 2003); *In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, Inc.*, 294 A.D.2d 245, 246 (N.Y.A.D. 1st Dep't 2002). *See also Matter of Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 180 (1995) (stating that where the Federal Arbitration Act applies, the arbitration of disputes is governed by the Federal Arbitration Act and not a contractually-binding state law to the extent it conflicts with the Federal Arbitration Act). Accordingly, New York state courts are not in conflict with this Court regarding the applicability of the "manifest disregard" standard of review to arbitrations governed by the Federal Arbitration Act.

Indeed, in the instant case, the New York courts reviewed the award under the manifest disregard standard and confirmed the award. The court of first impression, the New York Supreme Court, described the manifest disregard standard and its requirement that the "law allegedly ignored 'was well defined, explicit and clearly applicable to the case'" and concluded that:

> it is not shown that the arbitrators overtly disregarded any legal authority, or that the proposition for which

> [petitioner] Solow advocates is as well-defined and clearly established as it suggests. The arbitrators' decision to award Morgan some portion of its claim *is not shown to be* either irrational or *in manifest disregard of law.*

(A. 8a) (emphasis added).

On appeal, the New York Appellate Division, First Department, also reviewed the award under the manifest disregard standard. Unanimously, the Appellate Division held that application of the manifest disregard standard would not alter the Court's decision to confirm: "It does not avail landlord to argue that the award manifestly disregards the injunction, as well as this Court's decision in *Sage Realty Corp. v. Omnicom Group*, 278 A.D.2d 57, and therefore must be vacated." (A. 2a). New York's highest court, after reviewing petitioner's brief seeking to appeal based on "manifest disregard," denied the motion for leave to appeal. (A. 14a)

Thus, unlike *Wien & Malkin*, the arbitration award in this matter has already been reviewed under the "manifest disregard of the law" standard by all levels of the New York courts. Regardless of whether the Federal Arbitration Act governs, the New York courts have already tested the award according to the Federal Arbitration Act standard and have found no manifest disregard of the law.

The Issue of Whether the Federal Arbitration Act Governs Was Not Preserved For Review

Furthermore, the issue of whether the Federal Arbitration Act governs the review of this award was not properly preserved for review by this Court. As this Court recently noted, "[w]e ordinarily do not decide in the first instance issues not decided below." *Cooper Indus. v. Aviall Serv.*, 73 U.S.L.W. 4041, 2004 LEXIS 8271, *22 (Dec. 13, 2004); *see also Glover v. United States*, 531 U.S. 198, 205, 121 S. Ct. 696, 701, 148 L. Ed. 2d 604, 612 (2001) (stating that "[i]n the ordinary course we do not decide questions neither raised nor resolved below").

After this Court's decisions in *Citizens Bank* and *Wien & Malkin*, which expanded the applicability of the Federal Arbitration Act, petitioner failed to argue in any of its subsequent appeals below that the Federal Arbitration Act applied to this case.

CONCLUSION

The applicability of the Federal Arbitration Act is moot because the New York courts below did apply the "manifest disregard of law" standard in reviewing the arbitration award. Moreover, the petition is not ripe because petitioner omitted to argue the applicability of the Federal Arbitration Act in any court below.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 04-758

IN THE

Supreme Court of the United States

SOLOW BUILDING COMPANY, LLC,

Petitioner,

v.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

RESPONDENT'S OPPOSITION TO CERTIORARI IS WITHOUT MERIT

The Relevant New York State Court Decisions Do Not Apply the Federal Arbitration Act Even in Cases "Affecting Commerce"

Respondent claims there is no conflict between the failure of the New York State courts to apply the Federal Arbitration Act ("FAA") standard of review to arbitration awards "affecting commerce," including the arbitration award at bar, and this Court's decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin LLP v. Helmsley-Spear, Inc.* (Opp Br. at 2). In order to make this claim, respondent misdescribes the relevant New York State court decisions.

The New York Court of Appeals has stated repeatedly the grounds on which an arbitration award can be vacated under New York law, and they do not include "manifest disregard of the law." *E.g., United Fed'n of Teachers v. Bd. of Educ.*, 1 N.Y.3d 72, 79 (2003) (grounds for vacating arbitration award under New York law are whether award "violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power"). *See also Banc of America Securities v. Knight*, 4 Misc.3d 756, 781 N.Y.S.2d 829, 834 (N.Y. Sup. 2004) ("there is no 'manifest disregard' or equivalent New York standard as a basis for a New York Court acting under New York law to set aside an arbitration award").

In contrast, the Courts of Appeals of every federal circuit recognize the "manifest disregard of the law" standard under the FAA. Petition at 4-5. The case at bar illustrates this conflict clearly,[1] and therefore is an ideal vehicle for review.

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1. Respondent errs in its contention that the State court below reviewed the arbitration award in this case under the FAA standard. *See* Opp. Br. at 5. The Appellate Division *only* applied the New York (Cont'd)

The crux of the matter is that the New York State courts have taken an unduly narrow view of what "affects commerce." It misses the point for respondent to argue that the New York State courts have applied the FAA standard of review in cases where those courts determined that the FAA governed. *E.g. Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103 (N.Y.A.D. 1st Dep't 2003). The problem is that the New York State courts have acted contrary to federal law – the FAA – in determining whether the FAA applies in the first place. *See Wien & Malkin*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003).

Here, in a factual situation nearly identical to that of *Wien & Malkin*, the State court below applied the New York State law standard of review, ostensibly because the transaction did not "affect commerce." However, the transaction *did* "affect commerce" as contemplated by this Court in *Citizens Bank* (Commerce Clause power should be extended to all economic activities that, "in the aggregate . . . would represent 'a general practice . . . subject to federal control'").

In *Wien & Malkin*, this Court remanded the matter to the New York State Appellate Division, First Department to determine, *inter alia* "whether the transaction at issue 'affected commerce'". *Wien & Malkin*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *cert. granted*, 540 U.S. 801, 124

(Cont'd)

State standard of review, not the "manifest disregard of the law" standard. *Solow Bldg. Co.*, 6 A.D.3d 356 at 356 (N.Y.A.D. 1st Dep't 2004) (citing *Matter of Silverman (Benmor Coats)*, 61 N.Y.2d 299, 308 (1984)). As the published headnote of the decision below describes its holding: "Court properly granted . . . motion to confirm arbitration award . . . *although award manifestly disregarded injunction, as well as Appellate Division's decision in prior action*. . . ." 6 A.D.3d 356 (emphasis added). In other words, the State court confirmed the award *even though* it was in manifest disregard of the law.

S. Ct. 222 (2003). On remand, the Appellate Division did not reach a clear decision on this point. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339, 343 (N.Y.A.D. 1st Dep't 2004). Thus, the issue has been left uncertain and subject to erroneous failure to apply federal law, as this case illustrates. This Court should grant certiorari to resolve the continued uncertainty and error in the State courts as to when the "affecting commerce" test is satisfied and, therefore, when the FAA rather than State law applies to an arbitration award.

The Issue of Whether the Federal Arbitration Act Governs Is Ripe for Review

Petitioner argued at all stages of this proceeding that the FAA "manifest disregard of the law" standard should be applied to the arbitration award at bar. Petition at 2 -3 and n.1. As shown, the Appellate Division, First Department, declined to review the arbitration award under the FAA standard. *Solow Bldg. Co.*, 6 A.D.3d 356 (N.Y.A.D. 1st Dep't 2004) *lv. denied*, 3 N.Y.3d 605 (2004); n.1 *supra*.

Thus, the issue of whether the FAA governs is ripe for review.

CONCLUSION

There is a substantial federal question presented for this Court's review as to whether State courts are systematically ignoring litigants' federal law rights by construing the "affecting commerce" standard too narrowly or ignoring that standard entirely. To clarify when the FAA applies to arbitration awards before the State courts that "affect commerce," a writ of certiorari should issue to review the order of the Appellate Division, Supreme Court of New York, First Judicial Department.

Respectfully submitted,

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